

REMARKS/ARGUMENTS

Claims 32-43 are active. The specification has been revised to disable active links. New claims 32-43 find support in the original claims and disclosure as follows: claim 32 (claims 1, 3, 6 and 8), claim 33 (claims 10 and 11), claim 34 (claim 12), claim 35 (claim 15), claim 36 (claim 16), claim 37 (claim 17), claim 38 (claims 18-19), claims 39-41 (claims 27-28, section bridging bottom of page 27 and top of page 28), and claim 43 (claims 1, 3, 6 and 8). In view of the above, the Applicants do not believe that any new matter has been added. Favorable consideration of this amendment and allowance of this application are now respectfully requested.

The Applicants express their appreciation to Examiner Joike for the helpful and courteous interview of January 17, 2009. To avoid prior art that taught sequences 100% identical to SEQ ID NO: 1, it was suggested that the claims be directed to DNA constructs containing additional distinguishing elements. It was also pointed out that step (c) in the independent claim opened the claim to read on numerous DNA sequences since it did not require a particular structure. The description of homologous or crosshybridizing promoter sequences was discussed and the Applicants were encouraged to show a structure/function relationship for claimed DNA sequences. Amendments to address the formal issues, e.g., embedded hyperlinks, were briefly reviewed.

Restriction/Election

The Applicants previously elected without traverse **Group I**, claims 1-21, directed to a promoter, construct and transformant. The requirement has been made FINAL. Claims 32-38 correspond to the elected invention. New method claims 39-42 depend from claims directed to the elected invention. The Applicants respectfully request that claims directed to any withdrawn subject matter which depend from or otherwise include all the limitations of

an allowed elected claim, be rejoined upon an indication of allowability for the elected claim, see MPEP 821.04.

Objections—Specification, Claim 8

These objections are moot in view of the amendments above.

Rejection—35 U.S.C. §102

Claims 1, 2, 4-9, and 12-21 were rejected under 35 U.S.C. §102(b) as being anticipated by Porro, et al., WO99/14335. This rejection is moot in view of the cancellation of the prior claims. It would not apply to the new claims which recited elements not disclosed by Porro, specifically, the SEQ ID NO: 1 promoter sequences which was isolated from a lactic acid producing yeast, see the top of page 3 of the specification.

Rejection—35 U.S.C. §103

Claims 10 and 11 were rejected under 35 U.S.C. 103(a) as being unpatentable over Porro, et al., WO99/14335, in view of Hause, et al., U.S. 2003/228671. This rejection is moot in view of the cancellation of the prior claims. It would not apply to the new claims because Porro and Haus do not disclose all the elements required by these claims, nor suggest the claimed combination of elements or provide a reasonable expectation of success for the useful properties of claimed DNA constructs. Porro and Haus do not suggest or provide a reasonable expectation of success for the superior properties resulting from the combination of the particular elements required by the new claims. As shown by Figs. 20 and 21, when a promoter for HOR7 gene is selected from SEQ ID NO: 1, lactic acid production is improved by 25 % or more compared to the case where other promoters were selected.

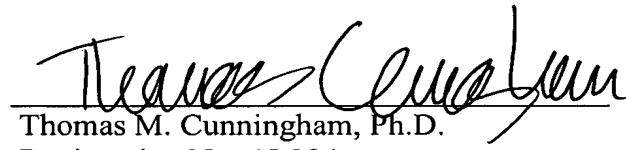
Furthermore, while it may have been known that the HOR7 promoter (osmolarity responsive gene) was expressed in response to osmotic stress, the inventors discovered that the HOR7 promoter is expressed in response to non-osmotic stresses and that such expression/activation was accelerated in the presence of lactic acid or lactate. The prior art does not provide a reasonable expectation of success for the superior properties of the DNA constructs made by selecting the particular elements (HOR7 promoter + DNA encoding lactate dehydrogenase protein) of the invention. Therefore, this rejection would not apply to the new claims.

Conclusion

In view of the amendments and remarks above, the Applicants respectfully submit that this application is now in condition for allowance. An early notice to that effect is earnestly solicited.

Respectfully submitted,

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